Filed 4/15/03 P. v. Bonds CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MACK CLEO BONDS, Defendant and Appellant.	B160990 (Los Angeles County Super. Ct. No. GA048811)

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge. Affirmed with modification.

Edward A. Hoffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

Defendant, Mack Cleo Bonds, appeals from his forgery conviction. (Pen. Code[1] § 470, subd. (d).) Defendant admitted that he had previously been convicted of a violent or serious felony. (§§ 667, subds. (b)-(i), 1170.12.) Defendant argues there was insufficient evidence to support his conviction and the prosecutor committed misconduct.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On February 14, 2002, defendant approached bank teller Diana Mena at a Wells Fargo Bank. Defendant handed Ms. Mena a check payable to himself and drawn on the account of the Hyatt Regency hotel in the amount of $897.42. Ms. Mena noticed: the font on the check appeared to be the type generated by a home computer; the printing was misaligned; the "pay to the order of" inscription was below the dollar amount; there were two signatures on the check; it was signed by felt tip pen; and no phone number for the hotel was included. In addition, the Wells Fargo website was printed on the check. Ms. Mena knew Wells Fargo did not print its web site on its business checks. Ms. Mena also noticed that defendant's endorsement completed in her presence did not match the identification he gave her. Defendant also provided Ms. Mena with a thumbprint. However, defendant offered the side of his thumb. Ms. Mena asked defendant to provide another print. Defendant's second thumbprint was also a partial print. When Ms. Mena asked for a third print, defendant complied. Ms. Mena took the check and defendant's identification to another employee, Luanne Carter, who agreed that the instrument was suspicious. Ms. Carter telephoned the Hyatt Regency Hotel. Thereafter, the police were summoned.

During the approximate 20 minutes that the verification efforts were pursued, defendant looked agitated. Defendant came to the side office where Ms. Mena was

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

conferring with Ms. Carter. Defendant walked into the office and complained that it was taking too long. Defendant also stated that he needed to leave to get to work. James Chatelain, controller at the Hyatt Regency Hotel in Long Beach testified that the check defendant attempted to cash at the Wells Fargo Bank: was not issued by the hotel; was not the hotel's check stock; and did not have either the hotel's legal name or authorized signature. The check did include the hotel's correct bank routing number.

Defendant testified on his own behalf. Defendant stated that he repaired cars for a living. Bill Wright was a regular customer of defendant, Mr. Wright referred a Black man named James to defendant for a van repair. Defendant did not know James's last name or phone number. James gave defendant a $200 cash deposit to replace the engine and transmission. Defendant told James to call in a few days. When the work was completed, defendant drove to Alhambra to return the van. Defendant intended to return to Los Angeles by bus. Defendant had never been to Alhambra previously. Although James was supposed to pay the balance of $600 in cash, he presented defendant with a check in the amount of $897.42. James directed defendant to a nearby Wells Fargo bank to cash the check and return the balance. James went to a nearby restaurant when defendant went to the bank.

Defendant did not know the check was fraudulent. Defendant gave the bank teller, Ms. Mena, his personal identification, endorsed the check in her presence, and complied with her instructions to place his fingerprint on the check on three occasions. Defendant became impatient when Ms. Mena spent over 30 minutes conferring with others and talking on the telephone. Defendant asked for the return of his check so that he could take it to his bank. Defendant was surprised when he was arrested. Defendant admitted that he had previously been convicted of two felonies.

Defendant argues that there was insufficient evidence to support his conviction for forgery because the prosecution failed to prove that he knew the Hyatt Regency check made payable to him was forged. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the

trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 470, subdivision (d), provides in pertinent part: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check . . . ." Defendant argues that although the prosecution proved the check he attempted to cash was not genuine, it was not demonstrated that he knew it was counterfeit or that he intended to defraud the bank. Defendant's testimony was not only uncorroborated but questionable. Defendant stated that he accepted a check issued by a hotel in his name. The check was purportedly given to defendant by an otherwise unidentified man known as James. Thereafter, he entered a bank in a city where he had never been before and attempted to cash the check. However, there was substantial evidence supporting the verdict: the check had numerous irregularities; the check was

fraudulent; defendant twice gave only partial fingerprints when requested to do so; and defendant became agitated when the teller, who was in possession of his identification, attempted to verify the check's authenticity. We agree with the Attorney General that the verdict is supported by reasonable inferences drawn from the evidence.

Second, defendant argues he was denied his right to a fair trial because of prosecutorial misconduct during jury argument. Prior to defendant's testimony, the trial court ruled that he could be impeached with his two prior felony convictions. However, the trial court limited the impeachment to the fact that he had been convicted of two felonies, without reference to the nature of the offenses. On direct examination, defendant acknowledged that he was convicted of felonies in 1992 and 1995. During his opening argument, the prosecutor argued: "[Defendant] knows how to get paid. He told you so himself. He gets cash. He knows how to cash checks. He goes to the bank, or he goes to a check cashing place . . . . [¶] The other thing about the defendant, as I watched him testify, is that, frankly, he's pretty street smart. I think that you have to be as a street mechanic. [¶] I mean, most of his clientele are people from the neighborhood. That's what he told you. [¶] . . . [¶] He's a two-time convicted felon. He knows what's going on out there." Defense counsel objected and alleged prosecutorial misconduct. The trial court overruled the objection for prosecutorial misconduct, but admonished the jurors: "Ladies and gentlemen, the evidence of [defendant's] prior convictions for felonies only go to the issue of his credibility as a witness." Thereafter, defense counsel argued: "What is [the prosecutor] doing is he is going and saying, yeah, he's a felon. And that's all he has. [¶] And the court told you, and I would tell you, because there is an instruction telling you that that just goes to one single thing, and that's the believability. That's one of the issues, and that applies to everyone. It doesn't matter whether its [defendant] or anybody else, but it tells you that if you've been previously convicted of a felony, then if you take the stand, you can be impeached with a felony. [¶] That is only for you to take into consideration. I guess they feel that someone convicted of a felony is more likely not to tell the truth. But what the prosecutor has done is say to you—planted the seed—he is a bad man, he is a

bad man. And a bad man would do something like this, because he has nothing else, ladies and gentlemen, and that is a low blow."

During closing argument, the prosecutor argued: "And really why, if you don't believe his story or what he testified to, you can't really believe what he's telling you when he said, I don't know that this check was counterfeit." Later, the prosecutor argued: "In terms of credibility, you know, defense counsel, you know, stated, well, you know, the [prosecutor] is, you know, how dare he, you know, bring up the fact that his client has been convicted for these felonies. [¶] Well, ladies and gentlemen, I never even asked the defendant that when he testified. His attorney asked him. In fact, I never asked him a question about that during the scope of testimony." Defense counsel's objection was sustained.

Prior to their deliberations, the jurors were instructed with CALJIC No. 1.00 that they were to follow the instructions where anything said by the attorneys conflicted with the court's instructions on the law. The jurors were also instructed pursuant to CALJIC No. 2.20 that: they were the sole judges of the believability of a witness; they were to determine the weight to be given the testimony of each witness; and they could consider the witness's prior conviction of a felony in making that determination.

In reviewing the principles governing findings of prosecutorial misconduct the California Supreme Court has consistently noted: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819, quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, *People v. Espinoza* (1992) 3 Cal.4th 806, 820; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Harris* (1989) 47 Cal.3d 1047, 1084, criticized on other

grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.) However, the California Supreme Court has held: "'"'[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . .' [Citation.] '[He] . . . ". . . is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets . . . ."'" (*People v. Wharton* [(1991)] 53 Cal.3d [522] 567-568 [].)' [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819, quoting *People v. Williams* (1997) 16 Cal.4th 153, 221.) The Supreme Court recently held: "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

In this case, the initial reference to defendant's prior convictions was related to his questionable credibility, a valid consideration for the jurors' consideration. The trial court overruled defendant's prosecutorial misconduct claim and immediately admonished the jurors that his prior convictions could only be considered on the issue of his credibility as a witness. Thereafter, defense counsel reiterated that admonition. The second reference clarified that although defense counsel suggested the prior convictions should not have been mentioned, they could be considered in assessing defendant's credibility. Considering the frequent admonitions and instructions, it is not reasonably likely that any of the prosecutor's comments were construed or applied in an objectionable fashion. The California Supreme Court has consistently stated that on appeal it is presumed that the jury is capable of following the instructions they are given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; *People v. Chavez* (1958) 50 Cal.2d 778, 790; *People v. Foote* (1957) 48 Cal.2d 20, 23; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333-1334.)

Even assuming the prosecutor's argument amounted to prosecutorial misconduct, defendant has demonstrated insufficient resulting prejudice to permit reversal of the judgment. The California courts have held that reversal may not result unless the misconduct contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a proper and timely admonition. (*People v. McDaniel* (1976) 16 Cal.3d 156, 176; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396-397; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 185.) This was not a close case. The compelling evidence of guilt included defendant's: admitted possession of the forged instrument made out in his name; attempts to cash the check at a bank other than his own; two efforts to make fingerprint identification impossible; and demand that the check and identification be returned to him so that he could leave the bank. Defendant's testimony served to reinforce the prosecution evidence. Any error was harmless given the conclusive evidence of defendant's guilt.

Following our request for further briefing, the parties agree that the abstract of judgment must be corrected to reflect that defendant's conviction followed a jury trial rather than a plea. California Rules of Court, rule 12(c)(1) provides in pertinent part, "[O]n its own motion, the reviewing court may order the correction . . . of any part of the record." (See also *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188.) As a general rule, the record will be harmonized when it is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) The Court of Appeal has held, "'[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.'" (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at page 452; see also § 1207; *In re Daoud* (1976) 16 Cal.3d 879, 882, fn. 1 [trial court could properly correct a clerical error in a minute order *nunc pro tunc* to conform to the oral order of that date if there was a discrepancy between the two].)

The clerk of the superior court is directed to prepare and deliver to the Department of Corrections an amended abstract of judgment, which reflects defendant's

conviction was pursuant to a jury trial rather than a plea. The judgment is affirmed in all other respects.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.